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In the Supreme Court of the United States

OCTOBER TERM 1985

CAROLE SHELBY CARNES TUCKER,
Petitioner,

versus

The Honorable WALTER F. MARCUS, JR., FRED A. BLANCHE, JR., JACK C. WATSON, and THE SUPREME COURT OF LOUISIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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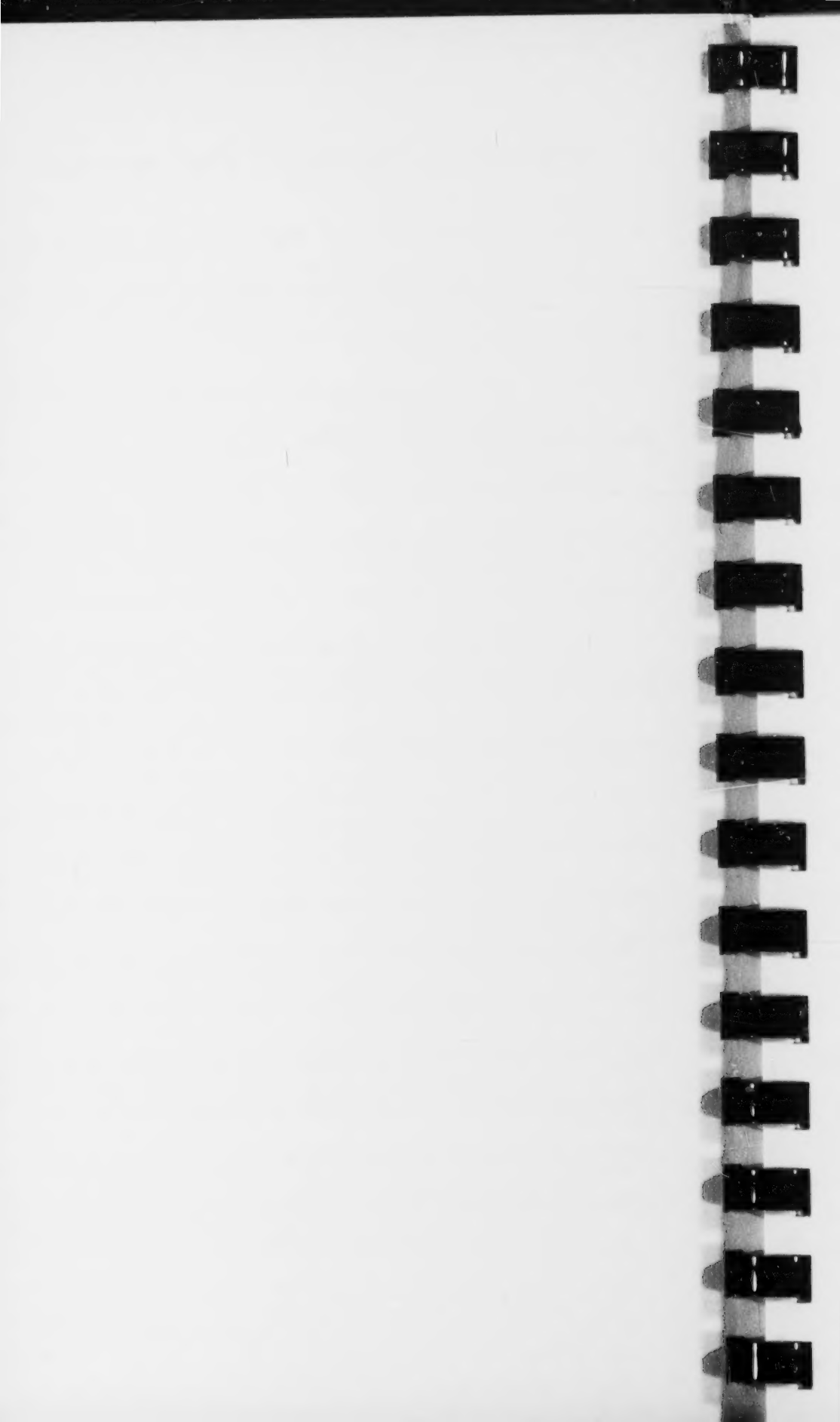
QUESTIONS PRESENTED FOR REVIEW

1. The application of the jurisdictional principles governing federal review of state court actions, as enunciated in *District of Columbia Court of Appeals v. Feldman*, 103 S.Ct. 1303 (1983).

2. Whether the test of 42 U.S.C. § 1988 "prevailing status" is technical or practical? A civil rights plaintiff presents multiple claims, and a federal appeals court grants an unexplained injunction. Defendants consent to further injunctions. The district court grants summary judgment based on some of plaintiff's claims, not reaching her other claims. Defendants do not appeal and, by their actions, moot plaintiff's remaining claims, thus according her "the very relief she sought" in bringing suit. Following a supervening decision of this Court, the district court then rules that both federal courts ex-

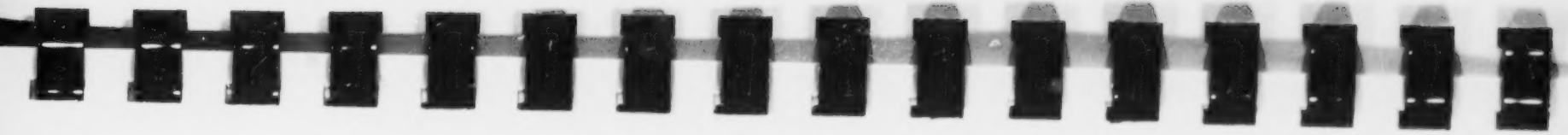


ceeded their jurisdiction in their grant of formal relief, but that they had jurisdiction over the claims that they didn't reach. Does a plaintiff "prevail" in such circumstances?

3. Whether a different panel of a Court of Appeals can treat as invalid a previous panel's unexplained order which is valid on its face?

4. Whether a federal magistrate, without the consent and over the objection of a party, has jurisdiction under FRCP 53(b), 28 U.S.C. § 636(b) or any other statute, to try the substantive civil rights issue of prevailing status in a 42 U.S.C. § 1988 claim arising out of a suit pending before the judge who tried it for 3½ years and comprising a voluminous record?

5. Whether a district judge, who has tried a suit which has pended for 3½ years and comprises a voluminous record, is bound under the "clearly erroneous" rule



to affirm a finding of prevailing status in the suit made by a magistrate who is a stranger to the suit and the record?

6. The procedural due process standards applicable to a proceeding pursuant to a FRCP 53(b) reference to a magistrate. For example, may the magistrate deny orders requested by the parties defining the issues which are before him for determination?

7. Whether it is legal error to conclude that there is no causal *nexus* between a civil rights suit and rule changes alleviating the alleged abuses where the only "evidence" of no causation is incompetent opinion testimony of interested witnesses (that respondents intended to change the rules anyway) which is refuted by substantial evidence, (*e.g.*, 15 months of litigation defending the rules' constitutionality and several federal court orders effectively compelling the changes?)

8. Whether a court that awards relief in respect of some of plaintiff's claims, thus pretermitting her other claims, and forecloses access to this Court by ruling *before the time for seeking this Court's review lapses* that it has jurisdiction over her claims, can tax her with the costs of the suit by retroactively deciding that it acted "improvidently"?

PARTIES TO THE PROCEEDINGS

The real parties to this proceeding are Shelby Tucker, Elliot Snellings, Brian J. Waid and Patrick Breeden, who seek an award of prevailing party attorney's fees, and the State of Louisiana, who would be liable for any such an award under LA R.S. 13:5108.1. The nominal parties to the suit are Carole Shelby Carnes Tucker, petitioner, and Honorables Walter F. Marcus, Jr., Fred A. Blanche, Jr., and Jack C. Watson, and the Supreme Court of Louisiana ("state court"), respondents.

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IN THE

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No.

CAROLE SHELBY CARNES TUCKER

Petitioner,

versus

The Honorables WALTER F. MARCUS, JR., FRED A. BLANCHE, JR., JACK C. WATSON, and THE SUPREME COURT OF LOUISIANA,

Respondents,

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petitioner, Carole Shelby Carnes Tucker, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered 10 March 1986.

OPINIONS BELOW

The Court of Appeals' opinion, 784 F.2d

654 (CA5 1986), is reprinted in the Appendix ("A") at 5-23; the District Court's opinions at A29-51, 58-127.

JURISDICTION

28 U.S.C. §1254 confers jurisdiction on the Court to hear this petition.

PERTINENT STATUTES

The pertinent constitutional provisions and statutes are reprinted at A149-152.

STATEMENT OF THE CASE

Personal circumstances obliged the petitioner, American born but settled in England and trained and practising as a barrister there, to return to the United States in 1979. Louisiana then had a rule prohibiting the licensing of any lawyer who had not graduated from a law school approved by the American Bar Association (the "accreditation rule"), which the state court had never enforced against foreign trained lawyers. In *Application of Anderson*, decided 28 January 1980, the

state court stated:

> "We recognize that the practice of granting exceptions can leave a rule without effect. To avoid this result, we suggest that the proper rule-making committee of the Louisiana State Bar Association study whether the rule should be changed."

377 So.2d 1185, 1187 (La. 1980).

Exempting another foreign trained lawyer from the rule on March 13, 1980, the state court's Chief Justice stated:

> "The rules of this court...were not designed to prevent qualified applicants from taking the bar examination and gaining admission to practice law in Louisiana. Their object was to prevent unqualified persons from taking the bar examination...
>
> "As the rule is written, no graduate of a foreign law school would be eligible to take the bar examination and practice in Louisiana, because the American Bar Association does not investigate, approve or disapprove foreign law schools. ...
>
> "The rules of this court...can be changed by this court, but the best and most responsive way to provide for the admission of new lawyers to the bar has long been thought to be through the organized bar.

> "Until..this court enacts a rule, we are relegated, in order to prevent rank injustice, to the expediency of examining the qualifications of every applicant who seeks relief from the committee's denial."

Application of Faylona, 381 So.2d 1203, 1204-1205 (La. 1980).

These individual evaluations were made as follows. *After* the foreign lawyer passed the bar exam, A49, the state court appointed a commissioner to take evidence and report on the "equivalence" of his legal training to that received at an ABA approved school. It then reviewed the commissioner's report and rendered its order. The Committee on Bar Admissions ("CBA"), an agent of both the state court and the Louisiana State Bar Association ("LSBA"), was a party to these proceedings. Different procedures were used in determining "equivalence". A French lawyer named Lendais retained the governor's brother as his counsel and was admitted to practice

on a showing of letters from law school deans, but other equivalence proceedings were conducted under the State's *disbarment* procedure. Using this procedure, the CBA delayed Anderson's and Faylona's licensing by 16 and 17 months.' A49.

Petitioner applied to the state court for relief from the CBA's denial of her application to sit the bar exam. The state court denied her application 11 days after *Anderson* and 34 days before *Faylona*. Although the CBA's intervention inaccurately traversed factual averments in her petition, the court conducted no hearing and assigned no reasons for its decision.[2] Three of the seven justices dissented.

1. They were certified as having passed the bar exam in September 1978 but were not ordered admitted to practice until January and March, 1980.

2. Two of the justices had stated previously their intention of enforcing the rule against *all* applicants, *Anderson*, 377 So.2d at 1187-88, suggesting that there was no consideration of petitioner's claims.

Justice Dixon stated:

> "Her qualifications are apparently better than any applicant who has petitioned this court to take the bar exam in the last 9 years. We have never denied any applicant with similar qualifications permission to take the examination. We have held that the rule must be changed, and when it is changed, this applicant will be qualified."

Justice Dennis stated that he

> "would grant applicant permission to take the bar examination and continue this court's former practice of allowing persons found qualified by this court to be admitted to practice on a case by case basis until our rules are changed to provide for a fair and systematic method for evaluating graduates of law schools in other nations."

Application of Tucker, 381 So.2d 1203 (La.), *reh. den.*, 380 So.2d 86 (1980) ("*Tucker I*").

These, then, were the conditions that existed when petitioner filed her complaint. The accreditation rule admitted no exceptions: *all* foreign trained lawyers were *deemed* to be less qualified to practice in Louisiana than the least quali-

fied graduate of an ABA approved school. To "prevent rank injustice" the state court permitted them to sit the bar exam, then determined their equivalence. Instead of *ordering* the rule to be changed, the state court delegated the task of determining *whether* it *should be changed* to the LSBA, whose agent, the CBA, appeared to be using the delays, expense and distress inherent in a disbarment procedure to compel compliance with the rule. The complaint, filed 15 February 1980, accordingly, asserted four main claims as *grounds* for relief:

1. The accreditation rule, *as applied to foreign trained bar candidates*, was unconstitutional on its face.

2. Enforcing a rule against petitioner that had already been changed by the State's uniform past practice of "granting exceptions" denied her due process and equal protection.

3. Using a disbarment procedure to determine equivalence denied foreign trained lawyers procedural due process.

4. The absence of procedures guaranteeing hearings of disputed factual issues, the right to call witnesses, etc., in reviewing CBA rejections of bar exam applications was impermissible.

A39-40, 81-82. She sought injunctive and declaratory relief, and *all* relief prayed for was appropriate to *all* of her claims. The basis for federal jurisdiction was 28 U.S.C. §§ 1331, 1343(3) and 2201.

On 21 February the District Court denied petitioner's motion for a temporary restraining order. Petitioner appealed, asserting all her claims in her appeal. A panel of the Fifth Circuit ("the 80-3143 panel") granted relief and remanded for further proceedings. It stated no *grounds* for its injunction. Its presumptively valid order was unexplained. A27-28.

Counsel who had always represented the CBA in state court proceedings, the CBA's chairman, now acted for the defendants in these proceedings. Moreover, the LSBA entrusted him with responsibility for acting

on *Anderson*'s rule study suggestion. A147-148. However, he believed that the rule was valid and didn't require changing and that *Tucker I* had overruled *Anderson*. A128-129. Thus, instead of changing the rule at once, the LSBA opposed six more waiver petitions attacking the rule in state court, while respondents resisted this suit for over a year. They rejected petitioner's offer to stay proceedings to permit opportunity of conducting the rule study, moved for an order impounding her exam results, moved the District Court and the Fifth Circuit to dismiss the complaint, obliged petitioner to obtain an order compelling answers to interrogatories, refused to stipulate uncontroversial facts touching petitioner's legal training, and strongly opposed her motion for summary judgment.[3] The District Court

3. This was only the beginning of what the Court of Appeals has called "a hurricane of paperwork".

ordered them to publish her exam results, A29, and respondents, though under no formal constraint,[4] nevertheless *consented* to two further orders allowing her to repeat the exam. A31, 33. On 6 April, 1981, the District Court granted her summary judgment, ruling that cases involving *domestically* trained candidates, on which respondents (and the CBA in opposing waiver petitions) relied, were inapposite to the question presented

A12. Later, when the District Court dismissed only *some* of petitioner's claims, A90-91, respondents sought an Extraordinary Writ from the Fifth Circuit, contending that the District Court had exceeded its power by ruling on *their* motion. *Compare Hensley v. Eckerhart*, 103 S.Ct. 1933, 1951 (1983) (civil rights defendants have "deeper pockets" and salaried lawyers and may drag out litigation to pressure plaintiffs to "give up" - *per* Justices Brennan, Marshall, Blackmun and Stevens). Having themselves created most of the record of "11 volumes of pleadings and several boxes of documents", A9, respondents then contended that petitioner's attorneys were seeking inordinate fees "to get one foreign-trained woman admitted to the Louisiana Bar".

4. The 80-3143 panel's restraining order applied only to the February sitting of the bar exam. A28.

by the complaint. A42. By grounding its decision on petitioner's equal protection claim, it avoided reaching an "'unnecessary decision on important constitutional issues'". *Maher v. Gagne*, 100 S.Ct. 2570, 2577 (1980). Regarding her attack on the state's disbarment/equivalence procedure, *the most important remaining impediment* to her admission to practice, the Court stated:

> "While we decline to find the present procedures for determining 'substantial equivalence' are unconstitutional, we suggest that any such proceeding which results in a final decision by the defendants on the 'substantial equivalence' question more than six months after the announcement of a candidate's successful completion of the examination may result in such a finding."

A50. The Court thus declared, in effect, that the disbarment/equivalence procedure which petitioner had attacked was presumptively invalid. Respondents did not appeal summary judgment.

The lower courts denied 11 motions con-

tending that the only "review" of petitioner's claims lay in this Court under 28 U.S.C. § 1257, and thereby closed that avenue of "review" to petitioner who relied on their jurisdictional rulings, while the time for appeal to this Court lapsed.

In accordance with the District Court's suggestion, she now re-applied to the state court, which *rejected the CBA's request to adhere to previous practice and apply its disbarment procedure* in determining her "equivalence", A132-133, and, instead, conformed its order appointing a commissioner to the time limits specified by the District Court. A52-54. The commissioner reported that petitioner was "equivalent", A55, and the state court ordered her admitted to practice. *Application of Tucker*, 405 So.2d 506 (La. 1981) ("*Tucker II*"). Petitioner thus obtained "the very relief she sought", as the Dis-

trict Court noted. A86 n.7. She obtained "complete relief" on *all* of her claims and achieved "'the total accomplishment of the aims of the suit'". *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1938 (1983).

At the hearing before the commissioner on 11 June 1981, the CBA's own expert testified that petitioner was *better* qualified than graduates of ABA accredited law schools, and "there was no contrary opinion evidence". A56. It was thus clear that further efforts at preventing her admission to practice would be futile and that the LSBA could enforce neither its accreditation rule nor its disbarment/equivalence procedure against future foreign trained bar admission candidates. Seven *days* later, it appointed a committee ("Task Force") to conduct the study requested *16 months* before in *Anderson*. The *1981 Report of the Louisiana State Bar Association* included an explication:

> "The proliferation of law suits in both state and federal courts attacking the constitutionality of certain requirements and procedures have added to the [LSBA's] routinely heavy logistical work load. A task force has now been appointed to reevaluate the present rules and procedures to alleviate the problems..." A134.

The District Court now granted in part respondents' motion to dismiss, and dismissed all but the first of the claims stated *ante* at 7-8.

Meanwhile, petitioner moved for an interim award of attorney's fees.[5] The District Judge, *sua sponte* and without the parties' consent, referred her motion to a magistrate, who set a hearing for 21 July 1981. Respondents obtained a continuance, then delayed the hearing for another two years by various motions. Petitioner re-

5. Both lower courts found incorrectly that petitioner "began [her] efforts to secure [a fee] award" after she was admitted to practice. A11, 63. In fact, she moved for fees before she was admitted to practice and *before the LSBA appointed the Task Force. See post* at 56 n.16.

quested orders defining the issues in dispute. This was denied. She moved to recall the reference. This was denied. Her counsel (who now lived in England) asked the magistrate to proceed with the hearing, *as required by FRCP 53(d)*. The magistrate informed him that there would be even further delays if he refused to answer *any* question put to him at a deposition. When the hearing did finally occur, the magistrate permitted respondents to take *all* of their witnesses out of turn and adjourned the hearing for another month before counsel finished presenting his case. He then quashed petitioner's subpoenas and converted the adjournment date into a status conference. He then informed counsel, upon arrival for the conference, that he was proceeding with the hearing after all and that there would be another long postponement if counsel did not conclude his case. "We are looking to reschedule this matter

sometime in September or October, not next week."

The magistrate noticed the hearing to be proceeded with in accordance with *Hensley*, which is a case concerned with the *degree*, not the *fact* of prevailing status. The language of FRCP 53(b) ("matters of account") indicated that petitioner's prevailing status was not at issue. The "clearly erroneous" review standard of FRCP 53(e) indicated that the only disputed issues were "matters of account" (because it is inherently absurd to suppose that a judge who has tried a case pending before him for three years, attended all conferences with the parties and is familiar with a large and complex record, is obliged to defer to the factual findings of a magistrate who is a stranger to the case.)[8] Opposing counsel behaved as though the only disputed issues were "matters of account". The denial of counsel's

several requests for a pre-trial order defining the issues thus had the effect of occluding the issues, and the hearing proceeded on the assumption that petitioner's prevailing party status was not in dispute Counsel first learned that this issue *was* in dispute when he received respondents' *post*-hearing memorandum.

The magistrate adopted *ipsissima verba* respondents' post-hearing argument that petitioner had not prevailed because (a) she had only obtained formal relief in respect of claims which had since been dismissed for lack of subject matter juris-

6. There were four changes of magistrate during this litigation. The first heard all the pre-trial motions, then retired. The second presided over the fee proceedings until 21 July 1981, then retired. The case was re-alloted to a third magistrate who announced her intention of retiring. The case was more than three years old, and the record, then comprising more than seven volumes, completely new to the magistrate who found that petitioner had not "prevailed". The Eastern District of Louisiana now has five civil magistrates. Only two were fully active when this case was alloted to him.

diction under *Feldman* and (b) her other claims had not caused the rule changes. A103-109. The District Judge then accepted respondents' argument that the magistrate's causation finding was a factual finding by which he was *bound* under the "clearly erroneous" constraint of FRCP 53(e)(2) and denied fees.

> "'Another view of the evidence [he said] might well have been taken by the fact-finder. The evidence presented by the plaintiffs might warrant the conclusion that their suit and the efforts incident to it were a major factor in effecting the change, but it neither compels that deduction nor makes the contrary conclusion erroneous. We have neither prescience enough nor warrant to justify reassessing the evidence.' *Williams v. Leatherbury*, 672 F.2d at 551." A123.

Petitioner's appeal to the Fifth Circuit was allotted to a different panel which stated that it was "persuaded" that the former panel's restraining order was "improvident", A14-15, did not address petitioner's other contentions as to why she "prevailed", and, "guided by the unequi-

vocal, 'clearly erroneous' mandate of Fed.R.Civ.P. 52(a)", A21, affirmed the District Court's, *i.e.*, magistrate's causation finding and denial of fees.

REASONS FOR GRANTING WRIT

This case presents the following reasons of the kind stated in Rule 17 of this Court for exercising its discretion to issue a writ of certiorari:

1. The Court of Appeals for the Fifth Circuit has rendered a decision which affronts this Court's decision in *Feldman*.

2. There is conflict in the Circuits over both the definition of prevailing status in 42 U.S.C. § 1988 claims and the tests for determining catalytic *nexus* - causation in § 1988 claims mooted by the defendants' actions - issues which have not been but should be settled by this Court. The Fifth Circuit has rendered a decision articulating a definition of prevailing status which appears to misread

this Court's decision in *Hensley*, contravenes the Senate Report's citation to *Kopet v. Esquire Realty Company*, *infra*, and *Thomas v. Honeybrook Mines, Inc.*, *infra*, this Court's decisions in *Webb v. Board of Education of Dyer County)*, *105 S.Ct. 1923 (1985)*; *New York Gaslight Club, Inc. v. Carey*, 100 S.Ct. 2024 (1980); *Maher v. Gagne*, 100 S.Ct. 2570 (1980) and *Smith v. Robinson*, 104 S.Ct. 3457 (1984) and conflicts with decisions of the First, Third, Fourth, Sixth, Eighth, Ninth and Eleventh Circuits.

3. By *imputing* to an ostensibly valid order of the 80-3143 panel an explanation which does not appear on its face and invalidates the order, the panel below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. It has decided a federal question,

the scope of a magistrate's referral powers, which contravenes this Court's decisions in *La Buy v. Howes Leather Company*, 77 S.Ct. 309, 313 (1957), and *Mathews v. Weber*, 96 S.Ct. 549, 556 (1976).

5. It has so far sanctioned a departure from the accepted and usual course of judicial proceedings in the magistrate's conduct of FRCP Rule 53(b) reference proceedings as to call for an exercise of this Court's power of supervision.

6. It has rendered a decision at odds with this Court's decision in *Anderson v. City of Bessemer City, N.C.*, 105 S.Ct. 1504, 1512 (1985), by affirming under the "clearly erroneous" rule a factual finding supported by no "plausible evidence".

ANALYSIS

CONFLICT WITH FELDMAN

> "...United States District Courts... have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in non-judicial proceedings, which do

> not require review of a final state court judgment in a particular case."

103 S.Ct. at 1317.

The reasoning of the District Court, expressly basing its finding of jurisdiction over petitioner's challenge to the accreditation rule on the above language from *Feldman*, A69, 80-85, applies with equal force to petitioner's attack on Louisiana's disbarment/equivalence procedure. As the District Court noted of the accreditation rule, that procedure was also "adopted by the Louisiana Supreme Court in its rule making capacity on the [LSBA's] commendation", A85, and the state court explicitly acted in a "rule making capacity" in applying it to bar admission proceedings.

> "No procedure is set up for a hearing before the Committee on Bar Admissions;...there is, however, a procedure established for cases involving discipline and disbarment which incorporates all safeguards...This Court, therefore, under its inherent *rule-making power*, has concluded to

> appoint a Commissioner...and in his conduct of said hearing, the Commissioner is to be guided by the [disbarment] procedure delineated in the Articles of Incorporation of the Louisiana State Bar Association..."

Moity v. Louisiana State Bar Association, 121 So.2d 87, 91 (La. 1960) (emphasis added). The procedure was general in application, *see* A130-133, and predated and *was not adjudicated* by the state court in *Tucker I.*[7] Petitioner's attack on this procedure was, therefore, a "general challenge to state bar rules", *Feldman* at 1317, "a general constitutional attack on the [state's] scheme," *Howell v. State Bar of Texas*, 710 F.2d 1075, 1077 (CA5 1983), "which [did] not require review of a final state court judgment in a particular case", *Feldman* at 1317, that was not "inextricably intertwined with the state

7. The state court pretermitted the issue by denying her access to the bar exam. Equivalence hearings were conducted only *after* candidates passed the bar exam. A49.

court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar." At 1315 n.16.

In granting summary judgment, the District Court appears to have recognized the general nature of petitioner's claim:

> "Plaintiff...alleges...(3) the procedure employed in determining the substantial equivalence of foreign and domestic credentials is constitutionally impermissible."

A39-40. But in its 14 June 1983 opinion it ruled inconsistently that the claim *was* a challenge "'inextricably intertwined' with the state court's decision in *Tucker I*, A85-86, a clear misreading and, hence, contravention of *Feldman*.

Because the District Court incorrectly found that it lacked jurisdiction over petititioner's attack on the disbarment/equivalence procedure, neither it nor the panel below considered whether she prevailed because she obtained formal relief in respect of this claim or because her

claim was causally related to the state court's actions in *Tucker II* mooting the claim or under principles which this Court has established and clarified in *Smith*, 104 S.Ct. at 3467 n.10; *Maher*, 100 S.Ct. at 2577; *New York Gaslight*, 100 S.Ct. at 2029-31; and *Webb*, 107 S.Ct 1923.

TEST FOR PREVAILING STATUS

The different Circuits have applied different tests for prevailing status, and divergent standards have arisen within the same Circuit. *Compare Kentucky Association for Retarded Citizens, Inc. v. Conn*, 718 F.2d 182, 184-186 (CA6 1983) (requiring success on "the central issue"), and *Kirchberg v. Feenstra*, 708 F.2d 991, 998 (CA5 1983) (has plaintiff gained "anything" from the suit?); *Helms v. Hewitt*, 780 F.2d 367, 369 (CA3 1986) (suit achieved "some relief"), and *Taylor v. Sterrett*, 640 F.2d 663, 669 (CA5 1981) (has plaintiff acquired "primary" relief

sought?); *Hughes v. Repko*, 578 F.2d 483, 487 (CA3 1978) (plaintiff must essentially obtain principal relief sought), and *Fast v. School District of City of Ladue*, 728 F.2d 1030, 1033 (CA8 1984) (*en banc*) (fee due even where relief awarded differs from that sought). *See Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1152 (CA5 1985) (discussing multiplicity of tests within Fifth Circuit); *Institutionalized Juveniles v. Sec. of Pub. Wel.*, 758 F.2d 897, 910-912 (CA3 1985) (discussing multiplicity of tests within Third Circuit).

This Court has recognized without resolving this confusion, *Hensley*, 103 S.Ct. at 1939, 1951, and petitioner submits that this confusion is unnecessary. The reports of both Houses of Congress, S.Rep. No. 94-1011 (1976), H.R. Rep. No. 94-1558 (1976), show that three questions will *always* determine prevailing status:

1. Were plaintiff's civil rights violated?

2. Was the violation redressed?

3. Was the suit necessary to obtain redress?

If so, then plaintiff has prevailed. The cases cited in the reports to show Congressional intent and most cases interpreting Congressional intent since the statute was enacted support this threefold test. *See esp.* Senate Report at 5, *citing Kopet v. Esquire Realty Company*, 523 F.2d 1005, 1007, 1008-9 (CA2 1975) (benefits conferred on parties to state court action by discovery obtained in federal suit *dismissed for lack of subject-matter jurisdiction* entitled plaintiff to fees) and *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981, 984 (CA3 1970) (suit *dismissed for lack of subject matter jurisdiction* that prodded trustees to collect royalties owed to parties represented by plaintiff entitled it to fees); *New*

York Gaslight, 100 S.Ct. at 2029-31 (fees due for relief obtained in proceedings *integrally related* to district court suit); *Smith*, 104 S.Ct. at 3467 n.10 ("The legislative history makes clear that a plaintiff [asserting] substantial but unaddressed claims reasonably related to [his] ultimate success" is entitled to fees); *Maher*, 100 S.Ct. at 2577.

Courts have generally ruled that "success" is tested by a suit's practical, not its technical outcome. *Kirchberg*, 708 F.2d at 998 (success is a "realistic matter"); *Abraham v. Pekarski*, 728 F.2d 167, 175 (CA3 1984) (test is relief obtained, not success of legal theories); *Shakopee Mdewakanton Sioux v. City of Prior Lake*, 771 F.2d 1153, 1159 (CA8 1985); *Hennigan*, 749 F.2d at 1149 (fee due if rights conceded before judgment and action is not frivolous); *Helms*, 780 F.2d at 369-370 (fee due though suit dismissed on official immunity

grounds); *Institutionalized Juveniles*, 758 F.2d at 910-12 (party prevailed despite adverse judgment); *NAACP v. Wilmington Medical Center, Inc.*, 689 F.2d 1161 (CA3 1982) (fees owed despite dismissal of suit for lack of standing and plaintiffs' opposition to remedial agreement prompted by court's *sua sponte* order to investigate alleged abuses); *Monahan v. State of Neb.*, 687 F.2d 1164 (CA8 1982) (fee to parent who placed daughter in school through interlocutory order vacated for mootness after daughter graduated); *Sullivan v. Com. of Pa. Dept. of Labor, Etc.*, 663 F.2d 443 (CA3 1981) (fee for practically successful suit dismissed for failure to prove a civil rights "deprivation"); *Hennigan*, 749 F.2d at 1150, 1153 (plaintiffs against whom partial summary judgment awarded nevertheless entitled to fees because they followed court's suggestion and achieved their goal by obtaining pre-

clearance of reapportionment plan from the Justice Department).[8]

By this test, petitioner has certainly prevailed in this suit. First, her civil rights were violated, as both Justice Dixon and the District Court stated:

> "..We have never denied any applicant with similar qualifications permission to take the examination." A24.
>
> "It is clear that plaintiff has been denied equal protection..[and] due process." A48.

Second, these violations were redressed.

Finally, this suit was *necessary* to obtain that redress. Having been twice denied access to the bar exam, petitioner took the bar exam pursuant to an order of the Fifth Circuit, A27, and retook it pursuant to consent[9] orders of the District

8. *Hennigan* would appear to stand on all fours with the instant suit.

9. Consent alone confers prevailing status. Senate Report at 5, House Report at 7. Respondents were under no obligation to consent to these orders. The "appropriate remedy to [parties] aggrieved by

Court. A31, 33. Respondents were unable to impound her exam results because the District Court ordered them to publish those results. A29. Respondents accorded her an equivalence hearing because the District Court declared[10] that "she be permitted the opportunity to demonstrate that her legal education in England satisfies the standards for approval of the American Bar Association." A51. Respondents resisted her claim that their disbarment/equivalence procedure was unlawful, and applied that procedure to another foreign trained lawyer while her motion for summary judgment vigorously attacking this procedure

injunctions lies in interlocutory appeal under 28 U.S.C. § 1292(a)(1)." *Frazier v. Board of Trustees of Northwest Miss.*, 765 F.2d 1278, 1294 (CA5 1985).

10. The district court expressly abstained from issuing an injunction. A50. *Compare* House Report at 7. "A court should still award fees even though it might conclude...that no formal relief, such as an injunction, is needed."

was under submission. A130. The CBA urged them to apply that procedure to petitioner. A132. They applied a *new* procedure to her equivalence hearing, A52, because the District Court declared the presumptive invalidity of their former practice, A50, and she was ordered admitted to practice expeditiously.'' Seven *days* after her equivalence hearing, finally recognizing that they could not prevent her admission to practice and that neither the federal courts nor the respondents would tolerate a repetition of the treatment accorded to her, Faylona, Anderson and others, the LSBA appointed the Task Force that proposed the rule changes that mooted petitioner's attack on the rules. Each *one* of these successes "achieve[d] some of the benefit [that she] sought in bringing

9. Under the procedure branded by the District Court it had taken Faylona seventeen months and Anderson 16 months. A49.

suit". *Hensley*, 103 S.Ct. at 1939. *Each* amounted to "prevail[ing] on an important matter in the course of litigation." Senate Report at 5.

TEST FOR CATALYTIC *NEXUS*

This Court has not articulated a test for determining causal *nexus*, and courts of appeals have tried to fill this void, focusing their efforts on the *cause* and the *form* of the *nexus*. Another concern has been the required *degree* of *nexus*. *See Morrison v. Ayoob*, 627 F2d 669, 671 (CA3 1980) ("[T]he action need not be the *sole* cause...if [it] was a material factor in bringing about the defendant's action...To require some stricter standard of causation would mean that the defendant *could hide his true motivation behind what seems a plausible alternate justification.*") (emphasis added); *Robinson v. Kimbrough*, 652 F.2d 458, 466 (CA5 1981) (suit a "substantial factor" or "significant catalyst"

in effecting change); *Wooten v. Housing Authority of City of Dallas*, 723 F.2d 390, 392 (CA5 1984) (award due if suit made an "important contribution" to improvements achieved).

The Circuits have stressed the importance of event chronology in this analysis, *Honeybrook Mines*, 428 F.2d 985 (cited in Senate Report at 5); *Martin v. Heckler*, 773 F.2d 1145, 1148-49 (CA11 1985) (*en banc*); *Ortiz de Arroyo v. Barcelo*, 765 F.2d 275, 282 (CA1 1985); *Fields v. City of Tarpon Springs, Fla.*, 721 F.2d 318, 321 (CA11 1983); *Posada v. Lamb County, Tex.*, 716 F.2d 1066, 1072 (CA5 1983); *Miller v. Staats*, 706 F.2d 336, 341 n.32 (CADC 1983); *Com'rs Court of Medina Cty., Tex. v. United States*, 683 F.2d 435, 442 (CADC 1982); *NAACP*, 689 F.2d at 1169-70; *Robinson v. Kimbrough*, 620 F.2d 468, 478 (CA5 1980) ("The chronology of these events alone negates the defendants' statement

that a mere informal complaint would have motivated them to modify their conduct"); *Ross v. Horn*, 598 F.2d 1312, 1312 (CA3 1979); *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (CA1 1978), and strongly deprecated the value of defendants' assertions that change was "voluntary", particularly where the evidence is within their control, *Ortiz de Arroyo*, 765 F.2d at 282; *Posada*, 716 F.2d at 1072; *Morrison*, 627 F.2d at 671; *Nadeau* at 281. Causation is *presumed* where the court, as here, expressly refrains from formal relief to permit opportunity of remedial action, as shown by the House Report's citation to *Evers v. Dwyer*, 79 S.Ct. 178 (1958); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (CA4 1972); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (CA8 1970). And, in citing *Aspira of New York, Inc. v. Board of Ed. of City of N.Y.*, 65 F.R.D. 541 (SDNY 1975), both Congressional

reports suggest an important indicator of causation is the degree of resistance to plaintiff's suit.

> "It is true...that the decree is on consent...It is also true that defendants resisted fiercely for more than 18 months before what they deemed a change in the law...seemed to generate changes of heart." At 543.

See also Illinois Welfare Rights Organization v. Miller, 723 F.2d 564, 569 (CA7 1983) (continued litigation belied defendants' claim that they acted independently of suit).

Both Senate and House Reports and cases interpreting Congressional intent thus suggest four tests - event chronology, whether defendants control exculpatory evidence, express judicial restraint to permit remedial action, and degree of resistance met - as aids to determining whether this suit was a "substantial", "material" or "significant" "factor" or "catalyst" in *causing* the changes or made

an "important contribution" to the *form* of the changes. All these factors were strongly present in the instant case,[12] and the courts below applied none of them in their analysis of the *nexus* between this suit and the rule changes.[13]

Moreover, the courts below defied Congressional intent and this Court's decisions in refusing to consider the *nexus* between the suit and its *other benefits* - the abolition of the disbarment/equivalence procedure already accom-

12. All witnesses who testified that this suit had little effect on the rule changes were LSBA officers. The LSBA's lawyers defended the suit, and the LSBA defrayed disbursements incurred in defending the suit. The District Judge expressly declined injunctive relief in granting petitioner summary judgment "because we believe that declaratory relief is sufficient", A50, and suggested that petitioner re-apply to the state court. Respondents, represented by the LSBA's lawyers, resisted this suit for 16 months before they capitulated and appointed the rules change Task Force.

13. Her admission to practice completed "the very relief she sought" and mooted her suit, A86 n.7, *not* the *subsequent* rule changes.

plished in *Tucker II* (*compare* A133 and A52-55) and petitioner's admission to practice. A *nexus* between claims dismissed for lack of subject matter jurisdiction but shown to have been valid by related proceedings requires fees. Senate Report at 7, *citing Kopet*, 525 F.2d 1005, and *Honeybrook Mines*, 428 F.2d 981. Success in "integrally related" state proceedings requires fees. *New York Gaslight*, 100 S.Ct. at 2577. Achieving relief on "substantial but unaddressed" federal claims arising from "a common nucleus of operative fact" requires fees. House Report at 4, n.7; *Maher*, 100 S.Ct. at 2577; *Smith*, 104 S.Ct. at 3467 n.10; *McDonald v. Doe*, 748 F.2d 1055, 1057 (CA5 1984). *See also Parham*, 433 F.2d 421 (CA8 1970) (fee due after court withholds formal relief to permit defendants opportunity of acting voluntarily) (cited in the House Report at 8); *Clients' Council v. Pierce*, 778 F.2d

518, 520 (CA4 1985); *Lampher v. Zagel*, 755 F.2d 99, 102-103 (CA7 1985) (fees awarded for state court victory following federal court abstention); *Southwest Marine v. Campbell Industries*, 732 F.2d 744 (CA9 1984); *Wooten*, 723 F.2d at 391 (plaintiff prevails who shows connection between his suit and the "events" that moot his suit); *Sullivan*, 663 F.2d 443 (fees due for suit that was successful only because it prodded plaintiff's union to arbitration proceedings). Petitioner prevailed *irrespectively* of the subsequent rule changes because she acted on the District Court's suggestion that she reapply to state court and obtained relief by that "alternate route", *Hennigan*, 749 F.2d at 1153, after the District Court noted that the issue presented by her attack on the accreditation rule was *res nova* and branded the disbarment/equivalence procedure as presumptively infirm without otherwise reach-

ing those "important constitutional issues". 100 S.Ct. 2577.

INVALIDATING A FORMER PANEL'S ORDER

All the documents on which the District Court relied in its "claims" findings (A81-82) were presented to the 80-3143 panel, and the District Court specifically ruled that it had jurisdiction over petitioner's attack on the accreditation rule, A87, nor did the 84-3355 panel reverse this ruling. A20. A court's jurisdiction over a *claim* confers on it power to grant any *relief* which is appropriate to that claim. If the courts below had jurisdiction over the claim that the accreditation rule was unlawful, as they held (A87, 20) then the 80-3143 panel acted within its power in temporarily restraining the rule's enforcement against petitioner. *I.e.*, its order, which was unexplained, A27, was valid on its face. Doubting its validity, the 84-3355 panel should have

sought an explanation from the 80-3143 panel, or at least explained why the order could not have been valid in any circumstances, instead of which it impliedly imputed to the former panel's order a rationale (that it was based purely on petitioner's equal protection claim over which the Court lacked jurisdiction) that rendered it invalid. A14-19.

As *Frazier* noted, the proper remedy to a party aggrieved by injunction lies in interlocutory appeal. 765 F.2d at 1294. Respondents did not appeal the 80-3143 panel's order, and their subsequent actions mooted petitioner's claims. Interlocutory relief requires an award where a court does not proceed to a determination of the merits of a claim over which it has jurisdiction. *See* House Report at 8 ("entry of any order that determines substantial rights of the parties" deserves fees), *citing Bradley v. School Board of City of*

Richmond, 94 S.Ct. 2006, 2022 n.28 (1974), and other cases; Senate Report at 5 and cases there cited; *Smith v. Thomas*, 687 F.2d 113, 115-116 (CA5 1982) (fee due where preliminary relief leading to action moots claims), and *on appeal after remand*, 725 F.2d 354, 356 (1984) (defendant's capitulation to restraining order required fees); *Monahan*, 687 F.2d 1164; *Intern. Soc. for Krishna Consc. v. Anderson*, 569 F.2d 1027, 1029 (CA8 1978); *Massachusetts Fair Share*, 476 F.Supp., 296-297 (DMass).

LA BUY AND *MATHEWS*

> "..In *La Buy*, the District Judge on his own motion referred to a special master two complex, protracted...cases...The cases had been pending before him for several years, he had heard pretrial motions, and he was familiar with the issues involved. The master...was to hear and decide the entire case, subject to review by the District Judge under the 'clearly erroneous' test...The Court held that on these facts [FRCP 53(b)] reference was not permissible and affirmed the Court of Appeals' supervisory prohibition. *La Buy*, although nearly two decades past, is the most recent of our cases dealing with

> special masters, and our decision today does not erode it."

Mathews, 96 S.Ct. at 556 (footnote omitted).

§1988 was enacted pursuant to section 5 of the Fourteenth Amendment and thus ranks with the Constitution itself. The House Report at 1 states that its purpose is to make the "judicial remedy" of civil rights litigants cast in the role of private enforcers of "the important Congressional policies which [the civil rights laws] contain" (Senate Report at 2) "full and complete". Without such provision, says the House Report (at 1), such rights would be "meaningless". Article III of the Constitution guarantees to such litigants the right to be heard by a United States district judge. This right to adjudication of one's claims by a tenured judge, which is rooted in the *quam diu se bene gesserint* clause of the Act of Settlement, 1701, 12

& 13 Wm. 3, c.2, would appear to be central to our system of justice. It reposes on sound and strong public policy considerations, not least of which is "the need to maintain the confidence of the public in the factfinding process". *Cruz v. Hauck*, 515 F.2d 322, 330 n.14 (CA5 1975).'[14]

Thus FRCP 53(b) specifically limits

14. Unlike masters in the English system, from whom they are derived, acceptance of the office of magistrate does not disqualify the holder from higher judicial office. Three of the judges currently sitting in the Eastern District of Louisiana were magistrates before they received their appointments. The magistrate who heard the instant suit's fee petition became a district judge shortly thereafter. He was supported in his candidacy for the appointment by a senior partner of the law firm from which petitioner's counsel was dismissed during the course of this litigation. *See The New Orleans Times-Picayune*, March 3, 1985, p. A-5. While no doubtful motive is imputed to his conduct of the hearing, the public's interest in ensuring the *appearance* as well as the substance of impartiality in cases which are characteristically unpopular and where political power characteristically vests in the defendant is reason enough to condemn the practice of referring "prevailing status" determinations in § 1988 claims to magistrates.

references to masters to "matters of account...difficult computation of damages [and] upon showing that some exceptional condition requires it." Even then, they "shall be the exception and not the rule". A district court *must* respect these limitations. *Mathews*, 96 S.Ct at 555-56; *Wingo v. Wedding*, 94 S.Ct. 2842, 2848 (1974). A reference violating the Rule's constraints is invalid. *Piper v. Hauck*, 532 F.2d 1016, 1018-19 (CA5 1976). Such references amount:

> "to little less than an abdication of the judical function depriving the parties of a trial before the court on the basic issues involved in the litigation. The use of masters is 'to aid judges in the performance of specific judicial duties...' and not to displace the court."

La Buy, 77 S.Ct. at 313 (citations omitted).

> "This restrictive policy is necessary because ...the master's findings must be accepted unless they are clearly erroneous [and] involves the danger that the master,

> not the court, will in fact decide the case."

Wright & Miller, Federal Practice & Procedure: Civil § 2605.

The issue of prevailing status is not a "matter of account" or "difficult computation of damages", nor was a "showing" made that "some exceptional condition require[d]" the reference. *La Buy* held specifically that the need for an accounting does not justify referral of *other issues* to a magistrate. At 315. The length and complexity of the record, the familiarity with the record of the judge who tried the suit and, conversely, the magistrate's unfamiliarity with the record, all factors which are present here, *ante* at 17 n.6, are the very reasons why this Court has insisted on strict compliance with Rule 53(b)'s constraints and the mandates of the Constitution. *La Buy* at 311; *Mathews*, at 556.

Petitioner asked the district judge to rule on a judicial immunity challenge to her prevailing status asserted *after* her fee claim was *first* referred to the magistrate *before* remanding it to the magistrate. The district judge ignored this request. When the magistrate refused her request for orders defining the disputed issues, she made timely objection by moving the District Judge to withdraw the reference or define the issues. *Compare Cruz*, 515 F.2d at 330-331. The District Judge denied the motion. Nor can she have waived her right to object to trial of issues which ostensibly were not in dispute when both the magistrate and the District Judge refused her repeated requests for an order defining the issues. *Hayes v. Foodmaker, Inc.*, 634 F2d 802, 803 (1980). The reference was on the District Judge's own motion and lacked the parties' consent, as required by 28 U.S.C. § 636(b)(2). *Banks*

v. United States, 614 F.2d 95, 97 (CA6 1980). Hence the only statutory authority under which the magistrate could try the prevailing status issue was 28 U.S.C. § 636(b)(3). But *de novo* review is mandatory under § 636(b)(3). *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 355 (1980); *Hill v. Jenkins*, 603 F.2d 1256, 1258 (CA7 1979). Here there was no such review and, therefore, no "finding" that was incorporated in the judgment reviewed by the Court of Appeals. The magistrate merely substituted his judgment for that of the Court, contrary to *La Buy*'s express prohibition. 77 S.Ct. at 313.

CONDUCT OF THE FEE HEARING

The wide divergence of the proceedings before the magistrate from the accepted and usual course of judicial proceedings is apparent from the following summary of the facts stated *ante* at 14-17.

1. The manner of setting hearing dates

violated FRCP 53(d), which specifically requires the magistrate "to proceed with all reasonable diligence".

2. The citation of FRCP 53 in the order of reference, that Rule's express limitations (only "matters of account"), specifically denying orders defining the issues while issuing a pre-trial order suggesting that petitioner's prevailing status was not disputed, and respondents' pre-hearing pleadings suggesting that it was not disputed, led her counsel to believe that they were in Court to address "hours reasonably expended on the litigation", "reasonable hourly rate", "results obtained" and other Rule 53 and *Hensley* stated concerns.

3. By repeatedly granting continuances, peremptorily converting a conference to a hearing, quashing petitioner's subpoenas "*ex proprio motu*" and threatening further long delay if she did not conclude her

case, the magistrate denied her opportunity of examining her principal witness.

The conduct of the proceeding in this manner obliged petitioner, without help of discovery or examination of witnesses and *after the hearing*, to construct a case for prevailing status from materials she had used for her *other* claims. The magistrate concluded that she had not "prevailed", the District Judge affirmed his factual finding under Rule 53(e) and the Court of Appeals affirmed under Rule 52(a), thus implicating the very prohibition expressed by this Court in *La Buy*. The magistrate's judgment was substituted for that of the Court.

THE CAUSATION FINDING

Anderson v. City of Bessemer City, N.C. reaffirms settled judicial policy against retrying fact issues resolved by the trial court. However, it does recognize a limit to the discretion conferred on the trial

court, whose findings must be supported by *some plausible evidence*. 105 S.Ct. at 1512. Here there was *none*.

The lower courts found support for the magistrate's finding of no *nexus* between this suit and the rule changes in *Anderson*'s study suggestion made "even prior to the events of this case" and "the apparently credible testimony of Thomas O. Collins and John Combe concerning LSBA's motives for the [rule] change". A122-123, 21-22.

The state court's study suggestion

The state court could have changed its rules without resorting to the LSBA, *Faylona*, 381 So.2d at 1205, but it *did not change its rules*. It relied instead on the LSBA to propose changes, *ib.*; *Anderson*, 377 So.2d at 1187. The LSBA in turn assigned the task of acting on the *Anderson* suggestion to the CBA's Chairman, A147-148, who believed that *Tucker II* had

"overruled" *Anderson* and that the rules were constitutionally sound. A128-129. Thus the rules were not changed. Six months after *Anderson* the district judge asked the CBA's Chairman about progress in changing the rules and he replied that there was none. Entrusting such a task to the man who had spent many years defending the rules was like asking Chief Justice Burger whether, in his judgment, violent, popular revolt is needed to reform the Internal Revenue Code.

Anderson did not *order* a rule change. It did not even suggest that the rules *should* be changed. It "suggested" that a committee conduct a "study" to determine "whether" the rules should be changed. At 1187. As the state court was unwilling to act on its own, *Anderson*'s study suggestion must be evaluated in light of the structure of authority then in place to act upon that suggestion, and, so viewed,

it was clear that nothing would be done about it. And nothing was done about it. Respondents, represented by the CBA's Chairman, continued resisting this suit, and the CBA, represented by its Chairman, continued resisting accreditation rule petitions in state court until this suit compelled change 15 months after *Anderson*.

Collins' and Combe's testimony

The magistrate copied his summary of Collins' and Combe's testimony *verbatim* from respondents' post-hearing brief. He found, first, that they testified that the rule changes were not "mandated" by this litigation, A108, a fact which is not disputed and requires no testimony or proof. The district judge expressly did not reach the issue of the rules' constitutionality. A43.

The magistrate found, second, that the Task Force was appointed to consider changing various rules, not just the rules at-

tacked in this litigation, which may be, but the issue is not what the Task Force was asked to consider *after* the decision was taken to appoint it. The issue is what *caused* its *appointment*.'".

Finally, the magistrate found that this litigation was "not the moving force in the foreign trained students rule revision ...*[T]hey* would have suggested the rule change even if there had been no Tucker litigation". A108-109 (emphasis added.)

The crucially important word in this finding is "they". Collins and Combe did not appoint the Task Force, A144, and did not testify as to the *LSBA*'s motives in

15. *None* of the other changes were the subject of the antecedent litigation which, Collins stated in a prior admission, prompted the appointment, and they were changes of secondary importance. Articles published in the LSBA's bar journal and annual report clearly treated them as less important than those affecting foreign trained lawyers. *See* La.Bar.J., vol.30, p.68 (1982). They consisted chiefly of increasing the CBA from 10 to 11 members and adding an exam subject.

appointing the Task Force. Collins admitted that he could *not* "speak for the Bar Association"'s motives in appointing the Task Force and was only expressing a "guestimation". A144. Combe allowed that he only became familiar with the issues involved *after* its appointment, and "[a]n agenda prepared by Mr. Collins" first acquainted him with "the problem of the accreditation rule". A142-143. Their evidence is thus explicitly incompetent, hearsay, opinion testimony. Mr. Glusman, *who did appoint the Task Force*, was not called as a witness, and Collins' "agenda" was not proffered. But the district judge felt bound by the "clearly erroneous" rule to affirm the finding. .

The evidence for causation

On the other hand, the evidence of a *nexus* between this suit and the rule changes is substantial, as shown by the following summary:

1. The LSBA "discussed" the need for changes "over the years", A145, but did nothing about it until petitioner obtained injunctions assuring access to the bar exam, summary judgment shedding doubt on the accreditation rule's constitutionality and branding the disbarment/equivalence procedure, an order rejecting the LSBA's request for that procedure, moved for fees[16] and established her equivalence. A145-146.

2. Instead of accepting petitioner's offer to stay proceedings to allow a rule change study, respondents continued to resist this litigation until summary judgment was awarded against them 14 months after *Anderson*, while the CBA contested *four more* waiver petitions attacking the rule. In all, the CBA contested *and lost*

16. Cases noting the catalytic role of fee petitions include *Ramos v. Lamm*, 713 F.2d 546, 552 (CA10 1983); *Copeland v. Marshall*, 641 F.2d 880, 895 (CADC 1980) (*en banc*); *Palmigiano v. Garrahy*, 616 F.2d 598, 600 (CA1 1980); *Dennis v. Chang*, 611 F.2d 1302, 1306 (CA9 1980).

eleven consecutive accreditation rule waiver petitions.

3. The LSBA's Executive Counsel (Mr. Collins) explained in an article written shortly after the Task Force's appointment and two years before his testimony at petitioner's fee hearing that the Task Force was appointed to alleviate the burdens caused by litigation attacking bar admission rules and procedures. A134. This suit was the only such litigation then pending, and the Task Force was appointed 7 days after petitioner's equivalence hearing.

4. Both the Task Force's actions and the content of its proposals for change mirrored precisely the claims and results of this suit. The suit established that the issue presented by its attack on the accreditation rule, *as applied to foreign trained candidates* was *res nova*, A42, and the LSBA conceded (after contending otherwise) that a distinction had to be made

between domestically and foreign trained candidates. A135-136. The suit was unique in attacking the State's failure to prescribe educatonal requirements for foreign trained candidates, and the Task Force provided a three professor equivalence determination panel *explicitly modelled on petitioner's equivalence proceeding*. A139. The suit was unique in attacking the use of a disbarment procedure for determining equivalence. The Task Force noted, "In one of the recent cases [*i.e.*, this case], there was an objection to the use of 'disciplinary proceedings' for a bar applicant's petition and appeal", A139, and provided a procedure, A141, exactly respecting the time parameters contained in the District Court's declaration, A50, and exactly mirroring the state court's order in *Tucker II*. A53. The suit was unique in attacking the failure to provide a definitive procedure governing waiver petitions.

The Task Force stated, "This change will give the Court and the Committee definitive rules governing matters appealed to the Court.." *Tucker II* was alone in challenging the commissioner's claim to compensation. The Task Force provided: "The commissioner shall serve without compensation." *Tucker II* first questioned the LSBA's standing to oppose petitions to the state court for relief from the CBA's actions. The Task Force provided for LSBA standing to oppose such petitions.

5. Four of the Task Force's nine members were Justice Marcus, one of the respondents to this suit, Justice Dennis, who participated in *Tucker I* and *Tucker II*, the CBA's chairman, who is respondents' counsel, and the LSBA's executive counsel, who has been copied in correspondence in this litigation, all men who were familiar with the details of this suit.

6. Collins admitted on cross-examination that "one factor" in reviewing copies of documents in this litigation was their "possible pertinence to rule change" and that the Task Force came into being, "more than anything", in response to "current philosophy and evolution of the law" governing the disbarment/equivalence procedure - which "evolution" was unique to this litigation. In other words, this witness testified that this litigation was "a material factor" "contribut[ing] to the improvements achieved".

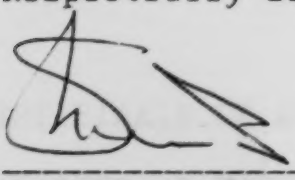
This finding is thus supported by *no* plausible evidence, refuted by substantial evidence, and should be reversed in accordance with *Anderson v. City of Bessemer City, N.C. See Martin v. Heckler*, 773 F.2d at 1149 (*en banc* court of appeals reversing panel's affirmance of district court's causation finding: "[w]e have searched the record in vain to find anything that would

show that plaintiff's action was not necessary to bring about a change in policy"); *Hennigan*, 749 F.2d at 1149 (defendant who moots claim has the burden of proving that he made change gratuitously for reasons unrelated to the potential merit of the suit).

CONCLUSION

For the foregoing reasons, petitioner Carole Shelby Carnes Tucker, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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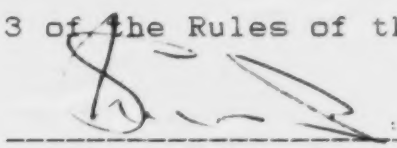
CERTIFICATE OF SERVICE

I, Shelby Tucker, a member of the Bar of this Court, certify that, on the _____ day of June, 1986, I effected service of three copies of the foregoing Petition, including its separately bound Appendix, on counsel of record for all opposing parties in strict accordance with the requirements of Rule 28.3 of the Rules of this Court.



Shelby Tucker